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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

In re Ked C., a Person Coming Under the Juvenile Court Law.	B154657 (Los Angeles County Super. Ct. No. CK40384)
LOS ANGELES COUNTY DEPARTMENT OF CHILDREN AND FAMILY SERVICES, Plaintiff and Respondent, v. UDELL C., Defendant and Appellant.	

Appeal from an order of the Superior Court of Los Angeles County. Valerie Skeba, Juvenile Court Referee. Reversed and remanded.

Andrea R. St. Julian, by appointment of the Court of Appeal, for Defendant and Appellant.

Lloyd W. Pellman, County Counsel, and Kim Nemoy, Deputy County Counsel, for Plaintiff and Respondent.

INTRODUCTION

Father appeals from the order terminating reunification services and alleges that the juvenile court failed to comply with the notice requirements set forth in the Indian Child Welfare Act (ICWA.) Appellant contends this error requires a reversal of the entire judgment below, including the judgment terminating parental rights. Respondent concedes that proper notice was not given under the ICWA. For this error, we will reverse and remand for proper notice to be provided under the ICWA.

Appellant further contends that the order terminating parental rights must be reversed because the trial court failed to provide notice of his right to file a writ petition challenging the orders made at the Welfare and Institutions Code section 366.26 hearing.[1] Appellant alleges at the 366.26 hearing the juvenile court erred in concluding that reasonable reunification services had been provided. Because of the alleged failure to provide notice of right to file a writ, appellant contends he can raise this error on appeal. We find that the record reflects that proper notice was provided to appellant and affirm the portion of the judgment terminating parental rights.

STATEMENT OF THE CASE

On May 21, 1999, a Welfare and Institutions Code petition was filed with the juvenile court on behalf of Ked C. and his two older siblings, Kei and D.[2] The petition was amended and ultimately alleged that Ked came within section 300, subdivisions (b), (d), (i) and (j). The petition alleged that Kei had been brutally sexually abused by a maternal uncle. Ked, an infant, was born with a positive toxicology screen for cocaine, his mother[3] currently abused cocaine, and Udell, K.'s father and appellant herein, had a

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[1] All further undesignated statutory references are to the Welfare and Institutions Code.

[2] These siblings are not subjects of this appeal.

[3] The mother is not a party to this appeal.

criminal history, including criminal convictions for assault, robbery and drug-related crimes.

Ked's detention hearing was held on May 21, 1999. The trial court found a prima facie showing had been made that Ked was a person as described by § 300, subdivisions (b), (c), (d), (g) and (i). The trial court found that a substantial danger existed to Ked's physical or emotional health and that reasonable efforts had been provided to prevent removal. The trial court ordered that Ked's temporary placement and custody be vested with the Department of Children and Family Services (DCFS) pending disposition.

At the hearing, the trial court inquired whether any parent had Native American ancestry. Ked's mother, Kesha P., answered in the affirmative, indicating her maternal grandmother was a "Native Indian Blackfoot." The court requested that mother provide DCFS with information on relatives who were affiliated with the tribe so that DCFS could send notice to the tribe as required by the Indian Child Welfare Act (ICWA). The court made no specific orders regarding ICWA and none were reflected on the minute order of the proceedings. The record does not reflect whether mother provided DCFS with any further information, nor does it show that the tribe or the Bureau of Indian Affairs was ever notified.

At the conclusion of the hearing, the trial court ordered that Udell be provided with reunification services and visitation. At a pre-release investigation hearing held on June 3, 1999, the trial court ordered that Udell's reunification services were to include referrals for parenting classes, drug testing and drug counseling.

A jurisdictional/dispositional hearing was held on November 3, 1999. The trial court found true an amended petition and declared the children dependents of the juvenile court. (§ 300, (b), (i) and (j).) The court found by clear and convincing evidence there was substantial danger to the physical health of the minor or of the minor suffering from severe emotional damage, and no reasonable means to protect without removal from the parent's physical custody.

The court offered reunification services to the parents, including ordering Udell to complete a drug rehabilitation program with random drug testing, parent education classes and anger management counseling.

A six-month review hearing was scheduled for February 3, 2000. DCFS reported that DCFS had not heard from father, nor had he visited Ked The court ordered DCFS to provide further reunification services.

A continued review hearing ultimately occurred on June 15, 2000. DCFS advised the court that Udell was incarcerated and requesting that visits be arranged so that Ked could visit him in custody. The court continued the matter and allowed visits between Ked and appellant provided someone could transport the child to the prison. Thereafter, father indicated that he did not wish to set the matter for a contested hearing and did not "wish to come back anymore[,]" even though he had completed a drug rehabilitation program and was attending parenting classes and courses in personal relationships.

A further hearing was conducted on February 1, 2001. This hearing was designated as a contested six-month/twelve-month referral hearing pursuant to section 366.22. At the hearing the trial court found that, "The court does not have information that parents have complied with the case plan." The court further stated, "All of the parents are incarcerated. I have almost no information that the parents did try to comply with the program." The court found that DCFS had provided reasonable efforts to reunite the family, terminated reunification services and set the matter for a §366.26 hearing to select and implement a permanent plan for the child. Father's counsel made no arguments and submitted on DCFS' recommendations.

In May 2001, DCFS reported that appellant had never seen Ked as he was incarcerated at the time of Ked's birth. Once father was released from custody, the DCFS social worker had attempted to arrange visits, but father again returned to prison. Appellant did not communicate with Ked by phone or in writing.

In August 2001, DCFS reported that father was still incarcerated, but had completed a drug education program and attended parenting classes and a personal relationship program. The DCFS social worker reported that Ked had been in his current foster home since he was four months old and the foster mother wanted to adopt him.

At Udell's request, a contested selection and implementation hearing was scheduled for October 25, 2001. Udell attended the hearing and testified on his own behalf. Other evidence presented to the court included the various DCFS reports that documented the history of the case, Ked's progress and the parent's efforts to comply.

The court found by clear and convincing evidence Ked was adoptable and that it would be detrimental to Ked to be returned to his natural parents. The court terminated parental rights, noting that father's incarceration prevented him from establishing a parental relationship with Ked and freed the child for adoption. The trial court ordered that Ked be provided a minimum of three hours per month of visitation with his paternal relatives, to be increased to six hours per visit after the first two visits.

Thereafter father filed a timely notice of appeal, appealing from the order terminating his parental rights.

APPELLANT'S CONTENTIONS

Appellant contends the judgment of the juvenile court terminating his parental rights must be reversed because: 1) DCFS failed to comply with the notice requirements of ICWA; 2) the trial court failed to inform appellant of his right to file an extraordinary writ; 3) DCFS failed to provide appellant with reasonable reunification services; and 4) the trial court erred in terminating parental rights when appellant did not receive reasonable reunification services.

Lack of Compliance with Indian Child Welfare Act

Both sides concur that the notice requirements of the ICWA were not met.[4] The failure to secure compliance with the notice provisions of the ICWA is prejudicial error (*In re Kahlen W*. (1991) 233 Cal.App.3d 1414, 1421. Appellant contends the juvenile court's failure to comply with the notice requirements of ICWA invalidates the entirety of the proceedings, including the order for termination of his parental rights. Respondent's position is that the matter should simply be remanded to the trial court to allow the tribal notification to occur. If no tribe indicates that Ked is an Indian child, then the order terminating parental rights should simply be reinstated as to Udell.

We agree with the respondent that this error does not necessarily require a reconsideration of the father's position by the juvenile court. *In re Marianna J.* (2001) 90 Cal.App.4th 731, describes the appropriate method for further disposition. On similar facts, *Marianna J*. held that "[l]acking proper notice, the proceedings . . . did not produce a valid termination of parental rights. The Act [ICWA] places the duty on the party seeking to terminate parental rights to notify known tribes. (25 U.S.C. § 1912(a).) [Department of Social Services] did not do so." (*Id*. at p. 739.) While failure to secure compliance with the ICWA was prejudicial error, the appropriate remedy is to correct the notice error. If, after notification, no tribe indicates that the minor is an Indian child within the meaning of the ICWA, reinstatement of the remaining orders is appropriate.

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[4] Title 25 United States Code section 1912(a) states "In any involuntary proceeding in a State court, where the court knows or has reason to know that an Indian child is involved, the party seeking the foster care placement of, or termination of parental rights to, an Indian child, shall notify the parent or Indian custodian *and the Indian child's tribe*, by registered mail with return receipt requested, of the pending proceedings and of their right of intervention. If the identity or location of the parent or Indian custodian and the tribe cannot be determined, such notice shall be given to the Secretary [of the Interior] . . . . No foster care placement or termination of parental rights proceedings shall be held until at least ten days after receipt of notice by the parent or Indian custodian and the tribe or the Secretary [of the Interior] . . . ." (Emphasis added.)

We shall therefore reverse the order terminating the parental rights of Udell, and remand the matter to the juvenile court to order that proper notice be provided in compliance with the ICWA.

Reasonable Efforts to Reunify/Termination of Parental Rights

Appellant also contends the trial court failed to provide him with notice of his right to file a writ petition challenging the findings of reasonable reunification services and the setting of a permanent plan hearing. Because of this alleged failure, appellant contends he may now raise in this appeal the errors made by the trial court at the section 366.26 hearing. In specific, appellant alleges the trial court erred in finding that Udell received reasonable reunification services. Respondent urges this court not to address these contentions because the order terminating reunification services is not an appealable order and appellant waived the issue by failing to raise it below.

Review of the orders made at a section 366.26 hearing requires the filing of a petition for extraordinary writ. Section 366.26, subdivision (l)(1) states: "An order by the court that a hearing pursuant to this section be held is not appealable at any time unless all of the following applies: [¶] (A) A petition for extraordinary writ review was filed in a timely manner. [¶] (B) The petition substantively addressed the specific issues to be challenged and supported that challenge by an adequate record. [¶] (C) The petition for extraordinary writ review was summarily denied or otherwise not decided on the merits.

California Rules of Court, rule 39.1B implements section 366.26. Subdivision (e) of the rule provides: "Failure by a party to file a petition for extraordinary writ review as specified in this rule shall preclude that party from obtaining subsequent review on appeal of the findings and orders made a juvenile court in setting a hearing under section 366.26." Together section 366.26 and rule 39.1B preclude appellant from taking this appeal.

Notwithstanding these rules, appellant contends he should be allowed to raise the reasonable reunification argument on this appeal because he was never advised of

his right to file the required extraordinary writ. This contention is not supported by the record. The minute order of the February 1, 2001 hearing states that "The clerk is ordered to mail a 'petition for writ' and a 'notice of intention to file a writ petition' to parents forthwith." A "notice of intent to file writ petition" was filed with the trial court on February 16, 2001.[5] No writ was ever filed.

Having failed to file a petition for extraordinary writ review, appellant is precluded from challenging the trial court's findings. (§ 366.26, subd. (l)(1)(A); Cal. Rules of Court, rule 39.1B(e).)

DISPOSITION

The order of the juvenile court terminating the parental rights of Udell is reversed. The matter is remanded to the juvenile court for compliance with the notice requirements of the ICWA. If, after receiving notice under the ICWA, no tribe indicates that Ked is an Indian child within the meaning of the Act, the juvenile court may reinstate the order terminating parental rights.

COOPER, P.J.

We concur:

RUBIN, J.

BOLAND, J.

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[5] The notice of intent to file a writ petition purportedly bears the printed and written signature of appellant. By a casual examination the written signature of "Udell [C.]", appears similar to the signature of Udell [C.] affixed to other court papers.